LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAY 7 1980
MICHAEL RODAK, JR., CLERK

[redacted]

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and rules involved	2
Statement	2
Argument	4
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Eastern Air Lines, Inc. v. *Union Trust Co.*, 221 F. 2d 62, affirmed *per curiam, sub nom. United States* v. *Union Trust Co.*, 350 U.S. 907	8
New York Airways v. *United States*, 283 F. 2d 496	5
Strahinare v. *United States*, 206 F. Supp. 665	8
United States v. *Schultetus*, 277 F. 2d 322, certiorari denied, 364 U.S. 828	8
Statute and Rules:	
Federal Tort Claims Act:	
28 U.S.C. 1346(b)	9
28 U.S.C. 2674	9
Air Traffic Rules:	
14 C.F.R. 60.12	5, 10
14 C.F.R. 60.12(c)	10
14 C.F.R. 60.14	7, 10
14 C.F.R. 60.14(b)	10
14 C.F.R. 60.14(d)	10

668531—62

Statute and Rules—Continued.

	Page
Air Traffic Rules—Continued	
14 C.F.R. 60.14(e)	11
14 C.F.R. 60.21–1	8, 11
14 C.F.R. 617.21(b)(1) (1952 Rev.), 16 F.R. 3461	8, 11
14 C.F.R. 617.26(a)(4) (1952 Rev.), 16 F.R. 3470	8, 11
Federal Rules of Civil Procedure:	
Rule 52(a)	5

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 579

FLORENE I. MILLER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings, conclusions and memorandum opinion of the district court (Pet. 46–65) are not reported. The opinion of the court of appeals (Pet. 29–45) is reported at 303 F. 2d 703. The order of that court denying the petition for rehearing is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1962. A timely petition for rehearing was denied on June 15, 1962. Time for filing a petition for a writ of certiorari was extended by order of Mr. Chief Justice Warren to November 12, 1962. The

petition for a writ of certiorari was filed on November 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in reversing the district court's determination that decedent was not contributorily negligent in the operation of the aircraft he was piloting at the time of the mid-air collision giving rise to this action.

2. Whether the government is liable to an airplane pilot, notwithstanding his own contributory negligence, for the negligence of airport traffic control tower personnel in failing to warn the pilot of other aircraft in the vicinity.

STATUTE AND RULES INVOLVED

The pertinent provisions of the Federal Tort Claims Act and applicable Air Traffic Rules are set forth in the Appendix, pp. 9–11, *infra*.

STATEMENT

This is an action under the Federal Tort Claims Act (*infra*, pp. 9–10) to recover damages for personal injuries and property damage arising out of the mid-air collision of two privately-owned aircraft over Boeing Field, near Seattle, Washington. Petitioners are the executrices of the estate of Mark Peter Miller, pilot of one of the planes, who seek to recover damages for his wrongful death, and the Terminal Flour Mills Company, owner of the plane, which seeks damages for its destruction. They assert that the accident was caused by negligence on the part of govern-

ment employees manning the control tower at Boeing Field.

On June 21, 1956, at approximately 9:35 a.m., in clear weather with visibility and ceiling unlimited (Pet. 54), a Beechcraft airplane piloted by Miller collided with a Cessna airplane. Miller, who was coming from Portland, Oregon, approached the field from the south and, pursuant to instructions from the control tower, piloted the Beechcraft along a clockwise (right traffic) pattern around the field. At the time of collision, his plane was northeast of the field at an altitude of just over 1000 feet, and was descending in a southerly direction in a turning left bank of 10–15 degrees. The Cessna, having taken off on a northerly course, turned right (east) as it climbed and leveled off at 1000 feet, then banked right again (south), putting it on a course generally parallel to the west (on the right) of the path of Miller's Beechcraft. The latter, descending in a left bank, overtook and collided with the Cessna. The right wing of the Beechcraft struck the Cessna's left wing from the rear.

The district court found the control tower operators negligent in several respects[1] and rendered judgment for the petitioners. In so holding, it rejected the government's contention that Miller was contributorily negligent in failing to see—and thereupon to grant the right of way to—the Cessna (Pet. 51, 62). The court based this ruling on its finding that "Miller

[1] The eight respects in which the district court found the government negligent are enumerated by the court of appeals in footnote 6 of its opinion (Pet. 33).

could have maintained a reasonable lookout * * * and not have seen the Cessna * * *" because his visibility was limited by reason of the facts that (a) he was in the left hand seat of the left-banking Beechcraft and could not see the Cessna on his right and (b) the Cessna was obscured by the camouflage effect of the background (Pet. 58–59, 60, 62).

On appeal the Ninth Circuit reversed; holding that "Miller's violation of the right-of-way rules was negligence which proximately contributed to this accident" (Pet. 44). It held that Miller's failure to grant the Cessna the right-of-way was not excused by either of the two circumstances relied upon by the district court. With respect to the first—the fact that, due to the left turn bank, the right wing and fuselage of his own plane blocked Miller's vision of the Cessna—the court held that Miller was required momentarily to roll or bank in order to have a view of any traffic on his right (Pet. 40). As to the camouflage effect of the background, the court concluded that the "thorough and diligent search" required by the applicable Air Traffic Rules should have revealed to Miller the movement of the white-winged Cessna across the stationary, multi-colored background (Pet. 37–38).

ARGUMENT

This case involves no issue of law peculiar to the Tort Claims Act but turns on the application of settled principles of the law of negligence to particular facts. There is no occasion, we believe, for review by this Court.

Petitioners do not question the finding below that Miller was contributorily negligent in failing to ma-

ment of the Beechcraft to obtain a view of any traffic on his right (Pet. 39–40).

They contend, however (Pet. 9–13), that the court of appeals improperly rejected the district court's conclusion that "Miller could have established a reasonable lookout while approaching the point of impact and not have seen the Cessna because of . . . the camouflage effect of the background" (Pet. 66). This contention rests on petitioners' assertion that the district court's conclusion was a finding of fact that Miller did not see the Cessna—which was not shown to be "clearly erroneous" and should, therefore, have been affirmed by the court of appeals in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

A review of the opinion of the court of appeals reveals that in conformity with Rule 52(a) it accepted as correct the district court's findings: "The 'lookout' which Miller actually maintained obviously did not reveal the Cessna to him" (Pet. 38). It reversed the district court solely on a question of law—whether the lookout which Miller maintained was a reasonable one. After noting that the undisputed record evidence showed that the white-winged Cessna was moving against a stationary, multi-colored background, the court of appeals stated (Pet. 37–38):

> The trial court did not find that, by reason of the camouflage effect, the Cessna was physi-

---

[5] The Air Traffic Rules require such a clearing maneuver. See 14 C.F.R. 60.12, *initial*, p. 19; *New York Airways* v. *United States*, 283 F. 2d 496, 498 (C.A. 2). At trial, petitioners' own expert witness testified that a prudent pilot "always" clears his path of vision in this manner before turning. See footnote 12 of the court of appeals opinion (Pet. 40–41).

> cally invisible. It found only that a "reasonable lookout" might not have revealed the Cessna. This was actually more of a conclusion of law than a finding of fact. The "lookout" which Miller actually maintained obviously did not reveal the Cessna to him. But whether that was a "reasonable" lookout depends upon the legal duty of care imposed upon Miller as a pilot, under the circumstances then existing. We think the court erroneously discounted the degree of care incumbent upon Miller with regard to the lookout to be maintained by him in approaching Boeing Field at that time and place.
>
> It may be that in order to have seen the Cessna against this background Miller would have had to look thoroughly and diligently in the area in which the Cessna was flying. But if this is the degree of care required of the ordinarily prudent pilot, then such is the standard to which Miller must be held. We believe that this is the standard imposed by the rules, and it is not for the courts to say that the standard is too exacting.

Thus, there is no violation of Rule 52(a) but solely a rejection by the court of appeals of the legal duty of care accepted by the district court.[8]

2. Petitioners also assert (Pet. 14–20) that the court of appeals should not have applied the Air

[8] Of no more merit is petitioners' suggestion (Pet. 11–13) that the issue of contributory negligence presented only a factual question. It is obvious that the question of the correctness of the standard of care applied by the district court presents an issue of law, and one wholly appropriate for review on appeal.

Traffic Rules prescribing the relative rights-of-way of converging and overtaking aircraft, 14 C.F.R. 60.14 (Appendix, *infra*, pp. 10–11), because the duty of care which they impose exceeds the corresponding common-law duty of care imposed upon operators of land vehicles. The fact that the CAA (now FAA) Air Traffic Rules impose on pilots an exacting duty of care is hardly one which suggests the need for—or, indeed, is even appropriate for—judicial review. As stated by the court of appeals, "this is the standard imposed by the rules, and it is not for the courts to say that the standard is too exacting" (Pet. 38).[1]

3. Alternatively, petitioners contend (Pet. 20–26) that, notwithstanding the contributory negligence of the pilot, the control tower operators must be held responsible because they have a "primary" duty to maintain safe conditions in the vicinity of an airport. The short answer to this interpretation of the relative responsibilities of control tower operators and pilots is that it is directly contrary to all existing authority;

---

[1] There is similarly no merit in petitioners' assertion (Pet. 19, n. 11) that the court below misconceived the manner in which the CAA intended the right-of-way rules to be applied. The assertion rests on an introductory "Note" to Section 60.14 of the Air Traffic Rules, 14 C.F.R. 60.14 (Appendix, *infra*, p. 10), which provides that the "Right-of-way rules do not apply when, for reasons beyond the pilot's control, aircraft cannot be seen due to restrictions of visibility * * *." Petitioners' claim is that since Miller did not see the Cessna, it "[could not] be seen" within the meaning of this "Note." The court of appeals, after reference to the language and over-all purpose of the Air Traffic Rules, properly rejected this argument holding that the phrase "cannot be seen" contemplates "only physical impossibility, due to such factors as weather or terrain" and not "mere difficulty of recognition or perception * * *" (Pet. 35–37).

The regulations expressly provide that, when flying in Visual Flight Rule (VFR) weather conditions, as is concededly the case here, the pilot has the primary responsibility for avoiding other aircraft. See 14 C.F.R. 60.21–1, 617.21(b)(1), and 617.26(a)(1) (Appendix, *infra*, p. 11). The courts which have considered this question have uniformly reached this conclusion. See *United States* v. *Schaltenbrand*, 277 F. 2d 322, 326–27 (C.A. 5), certiorari denied, 364 U.S. 828; *Stratmore* v. *United States*, 206 F. Supp. 665, 672–73 (D. N.J.).[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

SHERMAN L. COHN,
STEPHEN B. SWARTZ,
Attorneys.

DECEMBER 1962.

[5] Contrary to petitioners' suggestion (Pet. 25–26), there is nothing in the instant case inconsistent with *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F. 2d 73–80 (C.A. D.C.), affirmed *per curiam*, *sub nom. United States* v. *Union Trust Co.*, 350 U.S. 907. That case merely holds that the Federal Tort Claims Act intended to subject the government to suit for negligent control tower operations. There is nothing in *Eastern Air Lines* which even implicitly contradicts the recognized rule that a pilot flying in VFR weather conditions has the primary responsibility for avoiding collision.

APPENDIX

The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b):

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for

whose benefit the action was brought, in lieu thereof.

The relevant provisions of the CAA (now FAA) Air Traffic Rules are as follows:

14 C.F.R. 60.12:

> No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.
>
> NOTE: Examples of aircraft operations which may endanger the lives or property of others are:
>
> * * * * *
>
> (e) Lack of vigilance by the pilot to observe and avoid other air traffic. This includes failure of the pilot to clear his position prior to starting any maneuver, either on the ground or in flight; * * *.

14 C.F.R. 60.14:

> An aircraft which is obliged by the following rules to keep out of the way of another shall avoid passing over or under the other, or crossing ahead of it, unless passing well clear:
>
> NOTE: Right-of-way rules do not apply when, for reasons beyond the pilot's control, aircraft cannot be seen due to restrictions of visibility. * * *
>
> * * * * *
>
> (b) *Converging.* * * * When two or more aircraft of the same category are converging at approximately the same altitude, each aircraft shall give way to the other which is on its right.* * *
>
> * * * * *
>
> (d) *Overtaking.* An aircraft that is being overtaken has the right-of-way, and the overtaking aircraft, whether climbing, descending, or in horizontal flight, shall keep out of the way of the other aircraft by altering its course to the right, and no subsequent change in the relative positions of the two aircraft shall absolve

the overtaking aircraft from this obligation until it is entirely past and clear:

NOTE: Passing an overtaken aircraft on the right is required because the pilot in side-by-side, dual-control aircraft is seated on the left and has a better view on that side. Further, in narrow traffic lanes, passing on the left of an overtaken aircraft would place the overtaking aircraft in the path of the oncoming traffic.

(e) *Landing.* * * * When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right-of-way, but it shall not take advantage of this rule to cut in in front of another which is on final approach to land, or to overtake that aircraft. * * *

14 C.F.R. 60.21–1:

* * * It is the direct responsibility of the pilot to avoid other aircraft when flying in VFR conditions even with a traffic clearance. * * *

14 C.F.R. 617.21(b)(1) (1952 Rev.), 16 F.R. 3461:

(b) *Responsibility of pilots.*

(1) When flying in visual flight rule weather conditions it is considered the direct responsibility of the pilot to avoid collision with other aircraft. Under such conditions, the information and clearances issued by the control tower are intended to aid pilots to the fullest extent in avoiding collisions.

14 C.F.R. 617.26(a)(1) (1952 Rev.), 16 F.R. 3470:

When operating under visual flight rules it is the responsibility of the pilot to avoid collision with other aircraft. * * *